United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2448
2472,73

To be argued by
DON D. BUCHWALD

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 74-2448, 74-2472, 74-2473

UNITED STATES OF AMERICA,
Appellee,

—v.—

MANUEL LECLERES, RAFAEL BAEZ and
RAMON GARCIA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CASES

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Preliminary Statement

Manuel Lecleres, Rafael Baez and Ramon Garcia appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on November 6, 1974 and November 7, 1974, after a nine-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 318, filed on March 29, 1974, charged the three appellants and two other defendants—Pedro Ortas and Rafael Matos—in Count One with conspiracy to transport, conceal and sell automobiles stolen in interstate commerce (Title 18, United States Code, Section 371). Counts Two through Nine charged various defendants with transporting and concealing specific vehicles stolen in interstate commerce (Title 18, United States Code, Sections 2312 and 2313). Counts Two and Three involved transporting and concealing a 1964 Cadillac; Counts Four and Five a 1967 Mercury Cougar; Counts Six and Seven a 1971 Dodge

Swinger; and Counts Eight and Nine a 1957 Ford Thunderbird.*

Trial commenced on September 19, 1974 and concluded on October 2, 1974. Lecleres was found guilty on all counts, except the Dodge Swinger Counts (Six and Seven) on which he was acquitted. Baez and Garcia were convicted of conspiracy (Count One) and of concealing the stolen Dodge Swinger (Count Seven) and Ford Thunderbird (Count Nine). The only other count in which they were named (Count Five, alleging concealment of the Mercury Cougar) had been dismissed at the close of the Government's case.**

On November 6, 1974 Lecleres was sentenced by Judge Cannella to concurrent terms of four years imprisonment on each of the counts upon which he was convicted. He also was fined $5,000 on Count One.

On November 6, 1974 and November 7, 1974, Baez and Garcia, respectively, were sentenced to concurrent two year terms of imprisonment on each of the counts upon which they were convicted.***

Lecleres is presently serving his sentence. Baez and Garcia are at liberty pending this appeal.

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* Only Lecleres was named in every count.

** Ortas was found guilty on Counts One (conspiracy), Three (1964 Cadillac) and Nine (1957 Thunderbird), the only counts in which he was named. Matos had pled guilty to the conspiracy count prior to trial and testified as a government witness.

*** On November 6, 1974 Ortas was sentenced to concurrent eighteen month terms of imprisonment. By order of this Court, dated January 3, 1975, Ortas' appeal was dismissed when he failed to file his brief and appendix. Ortas is presently serving his sentence.

Statement of Facts

The Government's Case

The Government proved that during the period from January, 1972 through March, 1974, the defendant Lecleres stole or hired others to steal hundreds of automobiles from Connecticut and other states which were brought into and registered in New York under vehicle identification numbers ("VINs") taken from similar year and model cars (Tr. 243-267, 344-347, 591-598, 738-749).* License plates and VINs of the stolen cars were switched at the R & R garage, 602 Wales Avenue in the Bronx, operated by the defendants Rafael Baez and Ramon Garcia (Tr. 256-257, 276-299, 302, 328-333, 580, 585-587, 621-624, 629-636) and at P & P Auto Repair, 823 Melrose Avenue in the Bronx, operated by the defendant, Pedro Ortas (Tr. 276-278, 282-284, 300-301, 602-604, 748-749).**

The Government's proof consisted principally of the testimony of three accomplices—Norberto Ramos, Rafael Matos and Juan Perez;*** testimony of the true owners of the four cars referred to in the substantive counts and of one individual (Miriam Rivera) who purchased the stolen 1971 Dodge Swinger at R & R from the defendant Garcia;

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* The VINS were obtained largely from cars purchased at junk yards in New York or from automobiles which the ultimate purchasers of the stolen cars already owned (Tr. 246-248, 636-637, 639-641). Page references with the prefix "Tr." refer to the trial transcript, "GX" refer to Government Exhibits.

** Ortas had operated the premises at 602 Wales Avenue prior to the time Baez and Garcia took over the operation of what came to be known as R & R (Tr. 574-576).

*** Norberto Ramos had been granted informal immunity (Tr. 359). Rafael Matos had been named in Counts One and Five of the indictment and had entered a guilty plea to the conspiracy count (Count One) prior to trial (Tr. 661). Juan Perez, was not named in the indictment, but at the time of trial was under indictment in a related case in the District of Connecticut (Tr. 752).

testimony of various federal agents and New York City policemen as to photographic surveillance and the results of searches of the two garages conducted pursuant to federal search warrants and as to items seized from the defendant, Lecleres; certain automobile registrations filed with the New York State Department of Motor Vehicles; and prior statements made by certain of the defendants.

The Government's proof with respect to the substantive counts was as follows:

1964 Cadillac: Counts 2 and 3

On the late evening of November 18, 1972, Norberto Ramos, acting on Lecleres' request, stole a 1964 blue-gray Cadillac bearing Connecticut license plates from Pembroke Street in Bridgeport, Connecticut (Tr. 93-96, 306-308, 337; GX 305). He turned the car over to Lecleres in the Bronx. Lecleres, who had followed Ramos back from Connecticut in another automobile, then brought the stolen Cadillac to P & P (Tr. 306-308, 451-456). Lecleres paid Ramos for the car the following day at P & P. At that time, Ortas was repainting the top of the car red (Tr. 306-308, 461, 608-609).

Rafael Matos, who prior thereto had unsuccessfully looked in Connecticut with Lecleres for a Cadillac to steal, saw the Cadillac Ramos had stolen at P & P and was told by Ortas that he, Ortas, would change the VINs of the car himself (Tr. 605-609). Matos had previously seen Ortas driving a black over gray Cadillac which Ortas had told him he wanted to replace (Tr. 609-610, 689).

The stolen Cadillac, now bearing New York license plates and with the top painted red, was photographed by FBI agents on the sidewalk in front of P & P on March 8, 1973 (Tr. 51-55; GX 6A) and was seized by New York City police at that location on March 15, 1973 (Tr. 63-64, 67). At the time of the seizure, an altered vehicle identification

number was found to have been overstamped on to the frame of the car (Tr. 65-66) and the public VIN was also found to have been altered (Tr. 77-80). The vehicle was subsequently identified by its true owner (Tr. 68-69, 97-99; GX 301).

The stolen Cadillac had been registered by Ortas with the New York State Motor Vehicle Bureau on February 23, 1973 under the altered VINs (GXs 302, 303, 304). Ortas' registration listed the color of the car as black over gray (GX 302), but Ortas, when subsequently interviewed by the FBI on August 16, 1973, maintained that he had never painted the car and that it had a red top when he got it (Tr. 853-854, 952-956).

1967 Mercury Cougar: Counts 4 and 5

On February 6, 1973 a gold 1967, RX-7 model Mercury Cougar, bearing Connecticut license plates was stolen in Bridgeport, Connecticut (Tr. 175). The car was delivered to Lecleres and Rafael Matos at the R & R garage (Tr. 638). Lecleres and Matos removed the door warranty plate of the car and replaced it with the door warranty plate of a 1967 Mercury Cougar which they had purchased several months before at Company Salvage, a junk yard located near Shea Stadium (GX 501; Tr. 636-637, 641).*

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* Matos thought that the car was delivered by Norberto Ramos and Luis Gonzalez (Tr. 638). Norberto Ramos, however, could not have stolen this Cougar, because he was in jail in Connecticut on unrelated charges from January 14, 1973 to August, 1974 (Tr. 391). Sometime around Christmas, 1972, Norberto Ramos, at Lecleres' request, had stolen another 1967 Mercury Cougar from Milford, Connecticut which he was later instructed by Lecleres to deliver to Matos (Tr. 338, 343). Ramos was paid by Lecleres for this car (Tr. 340), but it also proved to be unsatisfactory for Matos' purposes. Matos and Lecleres had themselves unsuccessfully searched in Connecticut for the appropriate model 1967 Cougar to match the junked car purchased at Company Salvage (Tr. 638). Matos apparently needed an RX7 model so that the first five digits from the VIN of the junked car purchased at Company Salvage would be the appropriate digits for the stolen car (Tr. 544-48, 638).

Matos registered the Cougar stolen on February 6, 1973 under the VINs of the junked car purchased at Company Salvage (Tr. 546, 639; GXs 502, 503, 504).* The stolen Cougar was seized by New York City police in the driveway of R & R on April 17, 1973 (Tr. 544-546, 652-653).

1971 Dodge Swinger: Counts 6 and 7

On March 14, 1972, a 1971 Dodge Swinger bearing Massachusetts license plates, owned by one Nunzio Celona, was stolen from East Boston, Massachusetts.** At that time Celona was employed by the Digital Equipment Corporation of Maynard, Massachusetts and a Digital Equipment Change Order Log issued by the Company to Celona, and bearing Celona's name, was in the trunk of the car when it was stolen (Tr. 168, 170, 173; GX 705).

One month later, in mid-April, 1972, Garcia sold the stolen Dodge Swinger to Miriam Rivera at the R & R garage. Rivera paid Garcia a total of $1,500 in three installments for the car. Garcia told her that he was selling the car for the true owner who was in the army. Rivera identified two receipts given to her by Garcia (GXs 701, 702).*** On April 17, 1972 she registered the car in her own name with the Department of Motor Vehicles (GXs 706, 707) after receiving the keys to the car from Garcia following her final payment (Tr. 115-122).

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* Lecleres was further linked to Company Salvage by a Company Salvage receipt for another automobile found by FBI agents in his possession on October 4, 1973 (GX 505; Tr. 843-845).

** While Norberto Ramos did not himself steal any cars for Lecleres from Massachusetts, Lecleres told him that other individuals stole cars for Lecleres from Boston (Tr. 344-344A).

*** The receipts dated April 14, and 15, 1972, bore the purported signature of one Wilfredo Reyes (Tr. 860). This was the same name under which a registration for the stolen car was filed with the New York State Department of Motor Vehicles on April 11, 1972 (GXs 706, 708).

Rivera also identified a $1200 tellers check payable to herself which she had given to Garcia in partial payment for the car (GX 704; Tr. 123-124, 131). The tellers check was drawn on the Greenwich Savings Bank (Tr. 481-485), and bore the endorsements of Miriam Rivera and Rafael Baez (GX 704). On April 21, 1972, Baez deposited the $1200 teller's check in his own account at the Ponce DeLeon Savings Bank (Tr. 486-497).*

The following year, in April 1973, Rivera was advised by the Motor Vehicle Bureau that she could not re-register the car. She returned to R & R to see if it was still in business and was told by Garcia that his friend from the army might be willing to repurchase the car (Tr. 136-139, 162-163). At the request of New York City police she brought the 1971 Dodge Swinger in for inspection on April 17, 1973 at which time it was seized (Tr. 140-141, 500; GX 715).**

On August 13, 1973, during the course of a search of R & R conducted pursuant to a warrant, the Digital Equipment Change Order Log bearing Nunzio Celona's name was found in a closet in the business office of R & R (Tr. 170, 233-236, 800-805; GX 705).

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* Baez actually deposited $1100 and took out $100 in cash (GXs 709-714; Tr. 486-497).

** In the grand jury on March 27, 1974 Garcia denied ever accepting any money from, giving any receipts to, or selling any car to Miriam Rivera (Tr. 720); he denied that anyone at R & R had sold her a car, but stated that he had seen an unknown man sell her the car outside the garage and that she had confused that man with him (Tr. 721-722, 728-731); and he denied knowing anyone by the name of Wilfredo Reyes (Tr. 722-723). Garcia's grand jury testimony was admitted solely against him (Tr. 715-716; GXs 18, 19).

1957 Ford Thunderbird: Counts 8 and 9

In May, 1972 Lecleres and Matos went to the Provost Auto Salvage Company, a junk yard in the Bronx, operated by one Frank Ciuffettelli. Lecleres paid $150 for a junked 1957 Thunderbird which Matos signed for. Matos gave the sales receipt (GX 901) to Lecleres who was to arrange for a tow truck to pick up the Thunderbird (Tr. 640-642, 653-654, 904).

Matos next saw the junked Thunderbird at the P & P garage where it remained for several months * until it was replaced at P & P by another 1957 Thunderbird.** Ortas told Matos that Lecleres would switch the VINs on the "new" Thunderbird and the junked Thunderbird (Tr. 643-644).

By April 17, 1973 the "new" 1957 Thunderbird had been brought over by Lecleres to R & R (Tr. 645-647). It was found during the August 13, 1973 search of R & R, partially dismantled, with its VINs obliterated and bearing no license plate (Tr. 826-830; GXs 1E, 1F, 5A, 5B). The Thunderbird found at R & R had been stolen from Stamford, Connecticut on December 30, 1972 (Tr. 83-91, 827-833).

On August 16, 1973, three days after the search of R & R, defendant Baez was interviewed by the FBI and made oral and written statements (Tr. 885-889, 892-908, 970-975; Baez Exh. A which appears in Baez Appendix, pp. 83-84). He pretended the seized car was the same Thunderbird that had been purchased at Provost Auto. He claimed that

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* Garcia and Lecleres had both asked Norberto Ramos to steal a classic Thunderbird. Indeed, Lecleres and Ramos searched for one together in New Jersey. Ramos also searched in Connecticut. Ramos did not steal one, however, and Lecleres later told him to stop searching because he already had one (Tr. 286, 297-298, 341-343).

** This was the stolen Thunderbird. See, *infra*.

Matos had originally brought the seized Thunderbird to R & R to be fixed, that Matos was never seen again, and that after thirty days Garcia had taken out a lien on the car and it had been purchased by R & R at auction (Tr. 970-975).* Baez produced the Provost Auto Sales receipt signed by Matos (GX 901),** a lien affidavit in Garcia's name (but unsigned) for a 1957 Thunderbird with the same VIN as the junked car purchased at Provost Auto (Baez and Garcia Exh. C), and a bill of sale for the junked Thunderbird dated January 10, 1973 (Baez and Garcia Exh. D). This date, however, contradicted Baez' statement that the car (which in fact was stolen on December 30, 1972) had been left at R & R by Matos for 30 days prior to the time the lien was obtained. In addition, Frank Ciuffetelli, the owner of Provost Auto, was listed as the former owner of the car on the bill of sale produced by Baez. This was inconsistent with Baez' assertion that he thought that Matos owned the car. Finally, Baez' contention that he never saw Matos after Matos brought the car in to be fixed was contradicted by the testimony that Baez had driven Matos to the police station on April 17, 1973 when the 1967 Mercury Cougar was seized from the driveway of R & R (Tr. 652-653).

The Defense Case

Lecleres testified in his own behalf, and generally denied the charges (Tr. 984-998). He admitted knowing Baez, and having seen Garcia a few times and Ortas once. He also

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* Subsequently, in the grand jury, Garcia testified that he also had met and spoken with Rafael Matos only once, when Matos brought an old Ford to R & R to be fixed. Garcia further testified that he did not have the parts to finish fixing the car and that it remained at R & R until the police took it (Tr. 722-725).

** When Baez produced the receipt, the sales price had been raised from $150 to $750 by writing the number 7 over the number 1 (GX 901; Tr. 653-654). This was apparently done to make Baez' story more believable. The seized Thunderbird was actually worth over $3,000 (Tr. 91-92).

admitted knowing Norberto Ramos, Rafael Matos and Juan Perez and asserted that Ramos had tried to sell him cars which he had refused. In addition, he denied knowing what a vehicle identification number was (Tr. 998-1049).

None of the other defendants testified.

ARGUMENT

POINT I

The trial court's refusal to suppress Garcia's grand jury testimony was proper as was the admission of that testimony at trial, solely as against Garcia, in redacted form to avoid mention of any co-defendant.

Garcia's claim that his grand jury testimony of March 27, 1974 should have been suppressed is totally without merit.* Garcia appeared in the grand jury pursuant to subpoena, testified through a qualified Spanish interpreter, and was represented by privately retained counsel who waited outside the grand jury room during Garcia's appearance (H. 3-4; A. 11-12).** In the grand jury, Garcia was

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* On March 27, 1974 Garcia (and Baez) appeared in the Grand Jury pursuant to subpoena. The indictment was filed on March 29, 1974 and a hearing on the motions to suppress was held on May 16, 1974. Garcia's Grand Jury minutes, in toto, were admitted as an exhibit for purposes of the hearing (and are referred to herein as "GJ —"). In a written decision, filed June 12, 1974, Judge Cannella denied the suppression motion (A. 11-19). At trial, the testimony was admitted against Garcia only (Tr. 715-716) in redacted form to exclude all references to Garcia's lawyer, Garcia's occasional invocation of the Fifth Amendment, and Garcia's co-defendants (GX 18; Tr. 717-725, 728-731).

** Page references with the prefix "A." refer to the Joint Appendix filed by Garcia and Lecleres. "H." refers to the transcript of the May 16, 1974 suppression hearing.

fully advised of his constitutional rights and of the fact that he himself was a target of the investigation (GJ 1-3; A. 16-17) and Garcia acknowledged his understanding of those rights (GJ 30; A. 17).

Specifically, with respect to his Fifth Amendment rights, the following colloquy occurred:

> "Q. You understand that you may refuse to answer my questions if you believe that they incriminate you? A. Precisely, the attorney told me not to answer questions if these were questions that might incriminate me.
>
> Q. Sir, I am going to ask you certain questions. If you believe that they may incriminate you, you should on your attorney's advice, refuse to answer them. If you have a question in your mind, I would urge you to ask us to stop for a moment so that you can consult with your attorney outside. Do you understand what I have just said? A. Yes sir." (GJ 3; A. 17)

After twice conferring with his retained attorney and answering certain preliminary questions, Garcia was asked if he knew Pedro Ortas, at which time he asked to have the interpreter read a piece of paper which had been furnished to him by his attorney. It stated (in Spanish) "Give your name and your address and tell them that, with the advice of counsel, you're not going to answer that question because, should you answer it, it could accuse you of a crime." The piece of paper was retained and marked as a grand jury exhibit. When Garcia proceeded to say that Ortas "went once to work at the garage", he was immediately asked if he understood what the piece of paper he had furnished meant, and he responded affirmatively, indicating that he intended to answer certain questions (GJ 6-7; A. 19).*

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* Garcia asserts on appeal that "the Assistant United States

[Footnote continued on following page]

Thereafter, Garcia proceeded to answer a series of questions. When pressed concerning Miriam Rivera, Garcia asked to speak with his attorney again (GJ 15). After returning from this third conference with his attorney, he answered some additional questions. He was then shown xeroxes of certain documents * and was asked to produce the originals. He thereupon conferred with his retained attorney for a fourth time, and returned with the requested original documents which his attorney had given him (GJ 20-21).

On the basis of the foregoing, the trial court concluded that Garcia had been fully apprised of his constitutional rights by both the government and by his own counsel, and that he knowingly, intelligently and voluntarily waived his Fifth Amendment privilege in the grand jury (A. 15). This conclusion was clearly correct.

The procedure followed with Garcia in the grand jury is readily distinguishable from that employed in and disapproved by this Court in *United States* v. *James,* 493 F.2d 323 (2d Cir. 1974).

James, supra, involved a defendant who had been incarcerated for forty days and who had not yet had counsel appointed for him in this District when brought from the

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Attorney blatantly ignored the slip of paper Garcia had been given by his attorney and had brought into the Grand Jury room and proceeded to advise him of his constitutional rights." (Garcia Brief, p. 14). The assertion that the piece of paper was ignored is belied by the record and we assume that appellant has no quarrel with *having* been advised of his rights.

* These were the documents Baez had furnished to the FBI on August 16, 1973. The FBI had made xeroxes and had returned the originals to Baez. Baez also, moved below, to suppress his statements to the FBI and in the Grand Jury. That motion was denied in the same June 12, 1974 decision by Judge Cannella (A. 11-19).

Federal Detention Center at West Street to appear before a grand jury. James, an indigent defendant, was not represented by counsel when he appeared before the grand jury. Questioning of James continued after James had asserted his right to counsel during the course of the grand jury proceedings.

Unlike the defendant in *James,* the defendant here:

1. was not in custody, but rather appeared pursuant to subpoena; and
2. was not unrepresented but rather was represented by privately retained counsel whom he consulted prior to his appearance and who was present outside the grand jury room and available for consultation.

Indeed, on four separate occasions during the proceedings Garcia requested to, obtained permission to, and in fact did consult with his attorney. Each time he returned and continued to answer questions and on the final occasion he produced documents for the grand jury which his attorney had been holding.

The *James* decision has absolutely no application to the case at bar. Garcia's right to counsel was fully complied with. He was fully advised of his Fifth and Sixth Amendments rights, both on the record during the grand jury proceedings *and* by his own attorney. He understood (and, indeed, availed himself of) those rights. The warnings given to Garcia and the procedures followed by the prosecutor when questioning Garcia before the grand jury were fair, reasonable and constitutionally adequate.

Garcia's suppression claim rests on the erroneous premise that a witness subpoenaed to appear before the grand jury is entitled to the protection of the rules governing custodial interrogation established in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Absent the unusual situation where the witness is in federal custody, *e.g. United States* v. *James,*

supra, a person appearing before a federal grand jury pursuant to subpoena has not been "deprived of his freedom of action in any significant way," *Miranda* v. *Arizona,* 384 U.S. at 444, and is therefore not in custody for purposes of *Miranda. United States* v. *Corallo,* 413 F.2d 1306, 1330 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969); *United States* v. *Gollaher,* 419 F.2d 520, 524 (9th Cir.), *cert. denied,* 396 U.S. 960, (1969). *Cf. United States ex rel. Sanney* v. *Montanye,* 500 F.2d 411, 416 (2d Cir. 1974).* The witness, of course, is entitled to invoke his Fifth Amendment privilege as to any specific question that might incriminate him. However, a general statement that he stands upon his constitutional rights is no substitute for objections to answering specific questions. *United States* v. *Benjamin,* 120 F.2d 521, 522 (2d Cir. 1941). As the Court of Appeals held in *United States* v. *Cefalu,* 338 F.2d 582, 584 (7th Cir. 1964):

> "[T]he privilege accorded one called before a grand jury is the election to refuse to give testimony which might tend to show he had committed a crime. It is not designed to effect a prohibition against inquiry by an investigating body."

The possibility that the witness may invoke the privilege does not forbid the prosecution from asking the question. *Cf. United States* v. *Hutcheson,* 369 U.S. 599, 619 (1962). Appellant Garcia cites no authority to support his claim that once the privilege is invoked by the witness, the prosecutor is constitutionally forbidden from asking any further questions.**

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* Questioning before the grand jury does not become custodial interrogation merely because the witness is given *Miranda* type warnings. *United States* v. *Akin,* 435 F.2d 1011, 1013 (5th Cir. 1970).

** Of course, where the witness invokes the privilege in response to a specific question, it would not be proper for the prosecutor to attempt to circumvent the exercise of the privilege as to the information sought by that particular question by simply

[Footnote continued on following page]

Just as the prosecutor is entitled to ask a question which may cause the invocation of the privilege, so too can the witness waive the privilege by answering the question, especially where, as here, the witness is repeatedly advised of his privilege against self-incrimination by the prosecutor and by his retained counsel who stands available for consultation outside the grand jury room. Here the record amply supports the District Court's finding that "the statements made by defendant Garcia to the grand jury [were] the product of a knowing, intelligent and voluntary waiver of his Fifth Amendment privilege against self-incrimination." (A. 15).

On this appeal, Lecleres also objects to the introduction of Garcia's grand jury testimony at trial on the ground that it violated his Sixth Amendment rights under *Bruton* v. *United States,* 391 U.S. 123 (1968). This contention is also meritless.

Garcia's grand jury testimony was offered and admitted solely against Garcia (Tr. 715-716), without objection by Lecleres or any other co-defendant (Tr. 716). Indeed, the jury was even cautioned by the government during summation that it could consider the testimony only against Garcia (Tr. 1247, 1249). The redacted grand jury testimony read at trial (Tr. 717-725, 728-731), made no reference, directly or indirectly, to Lecleres. *United States* v. *Trudo,* 449 F.2d 649 (2d Cir. 1971), *cert. denied,* as *Hoover* v. *Estelle,* 409 U.S. 1086 (1972). Finally, the bulk of the

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rephrasing it in a different form. No such attempt was made in this case. On the other hand, it is entirely proper for the prosecutor, after the privilege has been asserted with respect to a particular question, to ask a *different* question which seeks to elicit *other* information.

Even in situations where *Miranda* applies, the prohibition against the renewal of interrogation after the individual indicates he wishes to remain silent is not absolute. *United States* v. *Collins,* 462 F.2d 792 (en banc) (2d Cir.), *cert. denied,* 409 U.S. 988 (1972).

grand jury testimony pertained to Garcia's sale (or alleged non-sale) to Miriam Rivera of the Dodge Swinger which was the subject of Counts Six and Seven of the indictment, the Counts on which Lecleres was in any event acquitted. Since Lecleres has not demonstrated that Garcia's grand jury testimony was "clearly inculpatory" *and* "vital to the Government's case" against him, his argument for reversal based on *Bruton* must be rejected. *United States* v. *Cassino,* 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied,* 410 U.S. 928 (1973).

In conclusion, the motion to suppress Garcia's grand jury testimony was properly denied. Its admission at trial, in redacted form, solely against Garcia was clearly proper.

POINT II

The evidence against Baez was more than sufficient.

Baez' contention that the evidence was insufficient to support his conviction is without merit.

Together with Garcia, Baez operated the R & R garage at 602 Wales Avenue in the Bronx. From June 1972 through January 1973, Norberto Ramos personally delivered hundreds of stolen automobiles with out-of-state licenses to the R & R garage (Tr. 260, 278, 288). Juan Perez delivered some 200 stolen automobiles to a place on Jackson Avenue in the Bronx, a three-minute walk from R & R; many of these cars were later seen by Perez at R & R (Tr. 596, 745-747). Rafael Matos also testified that cars stolen in his presence by men he had driven to Connecticut were later seen by him at R & R (Tr. 585-587, 597, 636). The suggestion that Baez was an "unknowing innocent" pales in the face of the volume of stolen cars brought to R & R, particularly in light of the photographs admitted into evidence

(GXs 1A-1Z) which established that the premises at R & R were relatively small.*

Indeed, the testimony of the three accomplices combined with the testimony concerning the results of the August 13, 1973 search of R & R,** demonstrated that it would have been virtually impossible for anyone to have been at R & R for any reasonable period of time, without knowing that it was the focal point of a stolen car operation.

Baez' posture of "unknowing innocence" is further belied by the fact that Baez told Matos that he (Baez) had urged Ortas to replace a fender on a stolen Ford Fairlane he had given Ortas, so that the VINs would not be exposed (Tr. 625-628). Baez' words to Matos provided direct proof of Baez' familiarity with the VIN-switching procedures, and his willingness to even discuss the matter with Matos demonstrated his awareness that Matos, as well as himself, was involved in the stolen car operation.

In addition, Juan Perez testified as to Baez' immediate acceptance shortly after taking over R & R of Lecleres' original proposal to go into business together. Whereas Garcia expressed reluctance at the dangers involved, Baez' reaction was one of immediate acceptance (Tr. 739-740, 789). At no time did the defense suggest, even by way of

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* The evidence established, for example, that the stolen Thunderbird had been at R & R for at least 4 months at the time it was seized during the search.

** In addition to the stolen Thunderbird and the Digital Equipment book (from the stolen Dodge Swinger), the authorities found (concealed in a drainpipe) a bag containing rivets (commonly used to affix VINs to metal) (Tr. 520-521, 556-557, 818-819; GX 11), and metal VINs (concealed in a brick wall) containing the identical numbers as were found on the altered VINs of a stolen Mercury Marquis seized the preceding week from an acquaintance of Lecleres' (Tr. 548-555, 612-616; GXs 1002A, 1003A, 1005A, 1005B).

hypothesis, any business (other than the stolen car business) in which Lecleres, Baez and Garcia were joined.*

In addition to this testimony, the defense offered no rational explanation for Baez' deposit in his own account of the teller's check given by Miriam Rivera to Garcia in partial payment for the stolen Dodge Swinger, a teller's check endorsed by Rivera and Baez, with no intervening endorsement (Tr. 486-497; GX 704).

Finally, the jury was entitled to draw an inference of guilty knowledge from Baez' false statements to the FBI concerning the stolen Thunderbird, from his presentation to the FBI of a sales receipt with the price raised from $150 to $750 and from his false denial that he had seen Matos after December, 1972 (Tr. 970-975; see pages 8-9, *supra*).**

In light of all the evidence the jury was plainly entitled to conclude beyond a reasonable doubt that Baez was a

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* Nor did Lecleres suggest any during the course of his testimony.

** In view of the vast direct and circumstantial evidence of Baez' guilt and Baez' transparently false exculpatory statements to the FBI, the instant case is singularly inappropriate for a reconsideration of this Court's decision in *United States* v. *Fiore*, 467 F.2d 86 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). In addition, we note that Baez' first request for a "multiple inference" instruction of the type rejected in *Fiore* came after the trial court's charge to the jury (Tr. 1353-1354; Baez Appendix 79-80). No such request had been submitted prior thereto, nor had the issue been raised when Judge Cannella outlined his intended charge for the benefit of counsel (Tr. 705-710). Finally, the argument advanced by Baez on behalf of the "two inferences" rule, which this Court has repeatedly rejected, *United States* v. *Fiore*, *supra*, 467 F.2d at 88; *United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 410 U.S. 984 (1973); *United States* v. *Lee*, Dkt. No. 74-1925 (2d Cir., January 9, 1975), slip. op. 1227 at 1229, is wholly unconvincing.

knowing participant in the stolen car conspiracy and that he knowingly concealed or aided and abetted in the concealment of the stolen Dodge Swinger (Count Seven) and Ford Thunderbird (Count Nine). *United States* v. *Wisniewski*, 478 F.2d 272, 279-280 (2d Cir. 1973). As this Court observed in *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966): "the trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts."

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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) ss.:
COUNTY OF NEW YORK)

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Don D. Buchwald

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